IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.399 OF 2005

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Ispat Industries Ltd. ...Petitioner

v/s.

Duke Offshore Ltd. ...Respondent

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Dr.V.V. Tulzapurkar with Mr.Sandip Parikh i/b Raj Baid for the Petitioner.

Mr.Gaurav Joshi i/b Ashiwn Ankhad & Associates for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 28TH MARCH,2006

P.C.:

1. By this petition the Petitioner challenges the award made by the arbitral tribunal directing the Petitioner to pay certain amounts.

2. Admittedly there was a contract entered into between the Petitioner and the Respondent. The Petitioner terminated that contract by letter dated 1-11-1997. The Respondent was claimant before the arbitrator. The Respondent claimed certain amounts from the Petitioner on the allegations that the termination of the contract by the Petitioner was illegal.

3. The Arbitral tribunal by the award has held that the termination of the contract by the Petitioner was illegal on several grounds. One of grounds on which the termination of the contract has been held to be

illegal is that though in the contract there was time fixed for completion of the work, there was provision for granting extension of time and there was also provision for levying liquidated damages for not completing the work within time and therefore time was not essence of the contract and therefore for terminating the contract on the ground that the work could not be completed within time, in view of the judgment of the Supreme Court in the case of M/s.Hind Construction Contractors by its sole proprietor Bhikamchand Mulchand Jain v/s. State of Maharashtra, AIR 1979 SC 720, it was for the Petitioner to issue a notice making time as essence of the contract and then terminate the contract for failure of the Respondent to complete the work within time and as the Petitioner terminated the contract without issuing such notice, termination of the contract is illegal.

4. The learned Counsel appearing for the Petitioner assails this finding by submitting that it is clear from the notice of termination dated 1st November, 1997 that the contract was not terminated because time was the essence of the contract and the Respondent failed to complete the work within the

time, but the contract was terminated because the Respondent abandoned the work and repudiated the contract. The learned Counsel relied on provisions of Section 39 of the Contract in support of his submission.

5. The learned Counsel appearing for the Respondent, however, submitted that it was no where the case of the Petitioner either before the arbitral tribunal or before this Court that the contract was terminated by the Petitioner, because the Respondent repudiated the contract.

6. In the light of the rival submissions, I have examined the record. I find that the arbitral tribunal has recorded its finding in this regard as follows:

> "Taking into consideration the nature of the work and the fact that the contract was extended from time to time and that in fact the contract was extended upto 31st December, 1997, we are of the opinion that in the circumstances of the case, it was necessary for the Respondents to give specific notice to

make time the essence of the contract and give reasonable time for completion of the contract. If within the time Claimants had failed to complete the work then it would have been reasonable and lawful for the Respondents to rescind the contract. The notice of termination without doing so, in our opinion, is clearly wrongful and illegal. In this behalf the decision of the Supreme Court already referred to above reported in AIR S.C. 1979 p. 720 (Hind Construction Case) is relevant. It is held therein that where in a contract between the State Government and a Contractor for construction of acquaduct across the river which stipulated a period of 12 months and power was conferred upon the engineer to grant extension of time for completion on reasonable grounds and further provision was made for levying and recovering penalty/ compensation from the contractor at specific rates for the unfinished work, after the expiry of the fixed days, such provision would exclude the inference that time was to be the essence of the contract. The rescission of the contract on the part of the

> State Government without fixing any period of time making the essence and directing the contractor to complete the work within that period, was clearly illegal and wrongful and thereby the State Government committed the breach of the contract with the result that the security deposit of the contractor could not be forfeited. For the aforesaid reasons we hold that the Respondents have wrongfully terminated the contract by notice of termination dated 1st November, 1997.

7. It is clear that the arbitral tribunal has held that the contract was terminated for failure of the Respondent to complete the work within the fixed time and this was done without issuing notice making time as essence of the contract. From the record I find that it was not the case of the Petitioner that the contract was not terminated because of failure of the Respondent to complete the work within time, but because the Respondent abandoned the work and repudiated the contract. Whether the Respondent repudiated the contract, whether the Respondent abandoned the work are questions of fact and therefore they will have to be raised before the

arbitral tribunal, without first raising this issue before the arbitral tribunal, these questions cannot be permitted to be raised for the first time before this court. The finding of the arbitral tribunal that the termination of the contract is illegal is a finding recorded by the arbitral tribunal after giving reasons in detail and therefore, in my opinion, the finding cannot be disturbed.

8. I have heard the learned Counsel appearing for both sides on the other reasons given by the learned arbitrators for holding that the termination of the contract is illegal. It is true that I find considerable force in the submission of the Petitioner that other reasons that have been given by the learned arbitrators for holding that the termination of the contract is illegal are not correct, but in my opinion, as one of the reasons given by the arbitrators for recording the finding that the termination of the contract by the Petitioner was illegal is perfectly legal and the award cannot be interfered with. Therefore, it is not necessary for me to record any findings in relation to other reasons given in the award.

9. The learned Counsel appearing for the Respondent conceded that the award awarding an amount of Rs.37,600/- along with interest from 11-9-1997 may be set aside. That part of the award is , therefore, set aside. Similarly, in view of the concession made on behalf of the Respondent, it is directed that on the sums awarded by clauses (a) & (b), interest shall be payable from 14-1-1998 and not from 18-9-1997 and 1-11-1997 respectively. With these modifications in the award, the petition is disposed of.

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